



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 20 2008

DEPUTY ADMINISTRATOR

MEMORANDUM

SUBJECT: Review of Memoranda of Understanding and Similar Agreements

FROM: Marcus Peacock
Deputy Administrator

A handwritten signature in black ink, reading "Marcus Peacock", is written over the printed name and title of the Deputy Administrator.

TO: Assistant Administrators
General Counsel
Inspector General
Chief Financial Officer
Chief of Staff
Associate Administrators
Regional Administrators
Regional Counsels
Deputy Regional Counsels

EPA has a long history of working together with our stakeholders and partners to meet the Agency's mission of protecting the environment. EPA frequently memorializes the terms of this collaboration and cooperation in a written document. The title of such a document is often "Memorandum of Understanding" (MOU), or "Memorandum of Agreement" (MOA), or "Statement of Principles." For ease of reference here, these types of documents are collectively referred to as "MOUs."

The typical MOU is an aspirational agreement between EPA and other entities describing the framework for cooperation and collaboration envisioned by the parties. While MOUs serve a number of useful purposes for EPA, they can also raise a variety of legal issues. For example, MOUs must be consistent with the Agency's mission and statutory authority. They are not appropriate vehicles for obligating funds.

To ensure that EPA's MOUs are legally sound, I ask that your offices have either the Office of General Counsel (OGC) or the appropriate Office of Regional Counsel (ORC) review each MOU prior to signature. I encourage your offices to involve either OGC or ORC early in the drafting process so that any issues can be identified and addressed before a document is finalized.

I do not expect the legal review process to slow down EPA's work on MOUs or to hinder our ability to enter into such useful documents. I ask OGC and the ORCs to complete their legal reviews quickly and efficiently. OGC has already developed and distributed a guidance document, the MOU Checklist, to assist Agency attorneys in performing these reviews.

I also ask each of you to designate a point of contact for maintaining and tracking MOUs in your office. This will facilitate coordination between offices and improve EPA's ability to locate MOUs on specific topics or with specific parties.

Please identify your office's point of contact to Acting Associate General Counsel Carol Ann Siciliano, who will also be able to answer any questions you might have regarding this matter. Carol Ann can be reached by phone at (202) 564-5489 or by e-mail at siciliano.carolann@epa.gov. Thank you for your attention to this important matter.

cc: Pat Hirsch, OGC
Carol Ann Siciliano, OGC

CHECKLIST REGARDING THE REVIEW OF MOUS, MOAs, SOIs, & SIMILAR INSTRUMENTS

Introduction

This checklist is intended to assist in the review of agreements such as Memoranda of Understanding (MOU), Memoranda of Agreement (MOA), Statements and Letters of Intent (SOI and LOI, respectively), Joint Statements of Cooperation (JSC), Statements of Principles (SOP), and other similar cooperative agreements that are intended to be primarily aspirational in nature. For purposes of this checklist, these agreements are referred to generically as "MOUs."

EPA may engage in such agreements with a variety of entities, including: federal agencies; state, tribal, and local governments; private non-profit or for profit organizations; and foreign governments/entities.

Attorneys in the Office of General Counsel (OGC) and Office of Regional Counsel (ORC) should use this MOU Checklist as general guidance when reviewing MOUs. The Checklist also provides model language for use in an MOU, as appropriate.

If a reviewer has considered the information in the Checklist and still has questions, or if the Checklist does not address an issue, the reviewer should contact the identified OGC point of contact for the issue(s) of concern (see Appendix A for OGC attorney contact information). The reviewer may also contact either the Cross-Cutting Issues Law Office (CCILO) or General Law Office (GLO) MOU point of contact, who will address the issue directly or consult the OGC MOU Review Team, as appropriate (the Team is comprised of attorneys from GLO, CCILO, Civil Rights and Finance Law Office (CRFLO), and the Ethics Program).

The lead OGC/ORC reviewer need not consult the OGC MOU Review Team on all Agency MOUs. However, he/she is expected to contact the Team for every MOU that is to be signed by the Administrator or Deputy Administrator and whenever he/she has determined that an MOU is sufficiently complicated or sensitive to warrant a more comprehensive Agency legal review.

Further, the reviewing attorney is expected to contact the appropriate law office attorney, as identified in the Checklist, in all cases where an MOU involves any one of the following:

- Intellectual property (see Checklist Questions #16-#18): Consult OGC/GLO/IPLPG on all MOUs involving intellectual property considerations.
- Indian tribes (see Checklist Question #4): Consult OGC/CCILO on all MOUs involving Indian tribes.
- International (see Checklist Question #5): Consult OGC/CCILO/IELPG on all "international" MOUs.

- Joint financing by federal agencies of a commission, board or similar organization performing governmental functions (see Checklist Question #14): Consult OGC/CRFLO on all MOUs involving such joint financing.
- Liability (see Checklist Question #15): Consult OGC/CRFLO on all MOUs involving indemnification or hold-harmless provisions or any other provision addressing liability.

When using this Checklist, reviewers should keep in mind that it is intended to serve as general guidance only, and that there may be instances where the approach called for in this checklist does not apply to a particular MOU.

Note that this checklist is not intended for use in reviewing Partnership Program Agreements. These agreements usually involve the use of a partnership program name(s) or logo(s) and, therefore, constitute a distinct category of agreement which necessitates review by OGC General Law Office's Intellectual Property Law Practice Group (IPLPG). Nor is this checklist intended for use in reviewing instruments for which there is a specific legal basis (in statute or regulation) for the document to bind the Agency (e.g., MOAs under Section 128 of the Comprehensive Environmental Response, Compensation, and Liability Act). Additionally, please note that agreements with other federal parties or non-federal parties to jointly sponsor discrete events such as conferences, meetings, exhibitions, and similar events are covered by Ethics Advisory 96-15 and OGC has developed a separate template agreement for them. Regardless, reviewers of such agreements may find some of the information in this checklist useful.

CHECKLIST:
WHAT TO ASK WHEN PREPARING
OR REVIEWING AN MOU



- ☐ Is an MOU the appropriate instrument to use to accomplish the Agency's objectives?
See p. 5
- ☐ How should the MOU be titled? *See p. 5.*
- ☐ If the MOU is with another federal agency; a state, tribal, or local government; or foreign government, has the program office coordinated with the Grants or Regional Grants Management Officer? *See p. 5.*
- ☐ Does the MOU involve Indian tribes? *See p. 6.*
- ☐ Does the agreement involve a foreign government or entity or involve international efforts to promote environmental protection? *See p. 6.*
- ☐ Is the purpose of the MOU clearly explained? *See p. 7.*
- ☐ Does the MOU provide the necessary context/background? *See p. 7.*
- ☐ Does the MOU describe EPA's authority to undertake the activities described in the MOU? *See p. 7.*
- ☐ Does the MOU set forth in a clear and concise manner the actions each party intends to undertake pursuant to the MOU? *See p. 10.*
- ☐ Does the MOU contain mandatory language or other provisions that create, or appear to create, binding legal obligations? *See p. 10.*
- ☐ Does the MOU contain the appropriate "no private right of action" language? *See p. 12.*
- ☐ Does the MOU provide for its commencement, duration, modification, and termination? *See p. 12.*
- ☐ Does the MOU purport or appear to obligate funds? Does the MOU provide for compliance with appropriations law and Agency policies relating to competition for grants and contracts? *See p. 13.*

- Does the MOU create the appearance that federal agencies are jointly financing a commission, board, or similar organization to carry out governmental responsibilities? *See p. 14.*
- Does the MOU include an indemnification provision? *See p. 14.*
- Is it possible that the activities described in the MOU may create or affect rights in intellectual property? *See p. 15.*
- Does the MOU authorize, or imply, that a party may use the EPA seal or identifier (logo)? *See p. 16.*
- Does the MOU authorize a party to use a program name or logo used by the Agency? *See p. 16.*
- Will the MOU involve sharing information that a non-federal party may consider to be proprietary? *See p. 17.*
- Does the MOU indicate that EPA is establishing, or actively participating in establishing, a corporation? *See p. 17.*
- Does the MOU create the appearance that EPA is establishing or participating in a *de facto* organization? *See p. 18.*
- Does the MOU contemplate that an EPA official will serve on the Board of Directors or a similar body that governs a non-federal organization? *See p. 18.*
- Does the MOU imply that EPA endorses the purchase or sale of commercial services or products? *See p. 19.*
- Does the MOU contemplate activities that are intended to benefit certain individuals *because of* their race or certain entities *because of* the race of their stakeholders (e.g., students, constituents, members)? *See p. 19.*
- Does the description of activities in the MOU raise issues under the Federal Advisory Committee Act? *See p. 20.*
- Does the Paperwork Reduction Act apply to activities under the MOU? *See p. 20.*

*See Appendix for OGC attorney contact information.

QUESTIONS TO ASK WHEN PREPARING OR REVIEWING AN MOU

Appropriateness of an MOU

1. **Is an MOU the appropriate instrument to use to accomplish the Agency's objectives?**

When reviewing a draft MOU or communicating with a program office regarding a planned MOU, it is important to consider whether an MOU is the proper vehicle for the intended activity. For example, if the program office wants to accept funds or in-kind resources from outside parties for conducting research and development, the appropriate vehicle may not be an MOU but rather a Cooperative Research and Development Agreement (CRADA) authorized by the Federal Technology Transfer Act. Similarly, if the activity contemplates the transfer of funds from an EPA program office to a non-federal party, using an MOU would not be appropriate; rather, the Agency's procedures for awarding financial assistance and contracts, which generally require open competition, would apply. Further, the appropriate vehicle for transferring funds to another federal agency is an interagency agreement rather than an MOU.

Contact Office: OGC or ORC contact attorney to be determined on a case-by-case basis, depending on the subject matter of the MOU.

Title

2. **How should the MOU be titled?**

It is important to remember that the title of an MOU is not, in and of itself, determinative of its legal effect. Although the title may provide evidence of the signatories' intent, it is the substantive terms of the MOU that are generally determinative of an instrument's legal effect. Regardless, however, the title should be carefully considered and selected to reflect the parties' legal intent.

Contact Office: OGC or ORC contact attorney to be determined on a case-by-case basis, depending on the subject matter of the MOU.

Delegation 1-11

3. **If the MOU is with another federal agency; a state, tribal, or local government; or foreign government, has the program office coordinated with the Grants or Regional Grants Management Officer?**

Under Delegation 1-11, the authority to sign agreements with other federal agencies; state, tribal, and local governments; and foreign governments, that “[s]et forth basic policies and procedures governing their relationships on matters of mutual interest and responsibility, under which no exchange of funds occurs” is delegated to the Grants and Interagency Agreement Management Division (GIAMD) at Headquarters. However, GIAMD often waives its signatory authority and allows a program office official to sign an MOU.

Given Delegation 1-11, reviewers of agreements covered by this delegation should advise the relevant program office to contact GIAMD in order that GIAMD may determine whether it should waive its signature authority. Note that Delegation 1-11 does not restrict the signing of such agreements by the Administrator or Deputy Administrator (i.e., such agreements need not be sent to GIAMD prior to signature). The same applies to agreements to be signed by Regional Administrators, or if signature authority has been redelegated, by Division Directors or Regional Grants Management Officers.

OGC Contact Office: Civil Rights and Finance Law Office (CRFLO)

4. Does the MOU involve Indian tribes?

MOUs involving Indian tribes may raise special issues due the unique legal status of federally-recognized Indian tribes and the federal government’s trust relationship with them.

OGC Contact Office: Cross-Cutting Issues Law Office (CCILO)/Communities & Ecosystems Practice Group

5. Does the agreement involve a foreign government or entity or involve international efforts to promote environmental protection?

MOUs with foreign governments, foreign entities, international organizations, and other organizations regarding international cooperative environmental efforts, are authorized by Section 102(2)(F) of NEPA. Some cooperative efforts may also be authorized pursuant to other U.S. law, including international agreements to which the United States is a party.

International understandings to which EPA is a participant are subject to, at a minimum, special coordination requirements involving EPA’s Office of International Affairs and the U.S. State Department. When considering an “international” MOU, a reviewer should keep in mind that the terminology acceptable for use in a domestic MOU is in some cases not acceptable for use in an international MOU. For example, an international non-legally binding MOU may not be referred to as an “agreement” (e.g., Memorandum of Agreement) because in the international context, the term “agreement” is generally considered to be indicative of the intent to be legally bound. At the same time, some

foreign governments associate the title “MOU” with a legally binding instrument and, therefore, in those instances, another title should be used or EPA should make certain that all participants share the same understanding of the instrument’s legal effect. Given the unique aspects of an international MOU, CCILO’s International Environmental Law Practice Group (IELPG) should be contacted in all cases where such an MOU is concerned.

OGC Contact Office: CCILO/International Environmental Law Practice Group (IELPG)

General Structure and Content

6. Is the purpose of the MOU clearly explained?

It is important for all involved to have a clear understanding of what is intended to be accomplished through an MOU. Therefore, the purpose of an MOU should be set forth clearly and concisely, either in a “Purpose” section or in some other way.

Contact Office: OGC or ORC contact attorney to be determined on a case-by-case basis, depending on the subject matter of the MOU.

7. Does the MOU provide the necessary context/background?

As a general matter, an MOU should at least briefly explain its context (e.g., events leading up to the MOU and/or the basis for each signatory’s interest in the activities called for in the MOU), in a “Background” section or included in another appropriate provision.

Contact Office: OGC or ORC contact attorney to be determined on a case-by-case basis, depending on the subject matter of the MOU.

8. Does the MOU describe EPA’s authority to undertake the activities described in the MOU?

An MOU should state the statutory provision(s) or other relevant provisions (e.g., international treaty) that provide EPA with the authority to undertake the activities described in an MOU.

Listed below are examples of statutes that authorize EPA to carry out voluntary programs to promote environmental protection. These statutes are provided as examples only.

There may be other statutes, regulations, treaties, etc., that provide EPA with the relevant authority.

A. General

1. Section 102(2)(G) of the National Environmental Policy Act, 42 U.S.C. 4332(2)(G). This section authorizes Federal agencies to “make available...advice and information useful in restoring, maintaining and enhancing the quality of the environment.”

2. Sections 6604(b)(5) and (b)(13) of the Pollution Prevention Act, 42 U.S.C. 13103(b)(5) and (13). Instructs EPA to develop and implement a strategy to promote source reduction through various means, including facilitating and recognizing the adoption of source reduction techniques by businesses. Source reduction, as defined in section 6603(5) of the PPA, 42 U.S.C. 13102(5), includes practices which reduce the amounts of hazardous substances, pollutants and contaminants released into the waste stream or the environment prior to recycling treatment or disposal. It also includes practices which reduce hazards to the public and the environment from such releases.

B. International

1. Section 102(2)(F) of NEPA, 42 U.S.C. 4332(2)(F). Recognizing the “worldwide and long-range character of environmental problems,” and “where consistent with the foreign policy of the United States,” this section authorizes EPA to “lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment.”

C. Media-Specific

1. Sections 103(a) and (g) of the Clean Air Act, 42 U.S.C. 7403(a) and (g). Section 103(a) authorizes EPA to encourage, cooperate with and render technical services to individuals and public and private entities to promote the coordination and acceleration of demonstrations and studies relating to the causes, effects and prevention of air pollution. This provision also authorizes EPA to conduct training for individuals in these areas. Section 103(g) authorizes EPA to conduct an engineering research and technology program to develop, evaluate and demonstrate non-regulatory strategies for preventing air pollution.

2. Sections 104(a) and (b) of the Clean Water Act, 33 U.S.C. 1254(a) and (b). These provisions authorize EPA to encourage, cooperate with and render technical services to individuals, including the general public, as well as public and private sector entities to promote the coordination and acceleration of demonstrations, studies and training relating to the causes, effects, prevention and elimination of water pollution.

3. Section 8001(a) of the Solid Waste Disposal Act, 42 U.S.C. 6981(a). This section authorizes EPA to encourage, cooperate with and render technical services to individuals as well as public and private sector entities to promote the coordination and acceleration of demonstrations, studies, training and public education programs relating to, among other things: adverse health and welfare effects of the release of solid waste into the environment; operation and financing of solid waste management programs; planning and operation of resource recovery and conservation systems and hazardous waste management systems; production and marketing of recovered resources; reductions in the amount of solid and hazardous waste and unsalvageable waste materials; and, the development and application of improved methods of collecting and disposing of solid wastes to recover and market materials and energy from these wastes.

4. Section 203(a) of the Marine Protection, Research and Sanctuaries Act, 33 U.S.C. 1443(a). This section authorizes EPA to encourage, cooperate with, and render technical assistance to public and private sector entities, including individuals, to promote the coordination of demonstrations, studies and training to minimize dumping of materials into the ocean that may unreasonably degrade or endanger human health, welfare, or the marine environment and economic potential.

D. Program-Specific Authorities

1. Section 303 of the Food Quality Protection Act, 7 U.S.C. 136r-1. This section authorizes EPA to make information on Integrated Pest Management (IPM) available to pesticide users and to promote IPM techniques.

2. Section 305(a) of the Toxic Substances Control Act, 14 U.S.C. 2665(a). This provision authorizes EPA to develop and implement activities designed to assist State radon programs. It specifically authorizes EPA to operate a voluntary proficiency program to rate the effectiveness of radon measurement devices and methods.

3. Section 324A of the Energy Policy and Conservation Act, 42 U.S.C. 6294a. Section 324A is entitled "Energy Star Program" and establishes a voluntary program to identify and promote energy-efficient products and buildings to reduce energy consumption and reduce pollution through voluntary labeling of products and buildings that meet energy conservation standards. Under this provision, EPA and the Department of Energy have authority to promote the use of Energy Star compliant technologies and work to enhance public awareness of the Energy Star label.

4. Section 104(k)(6) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9604(k)(6). This section authorizes EPA to provide training and technical assistance to individuals and organizations to facilitate the inventory, assessment, preparation and remediation of brownfields sites, including associated community involvement.

Contact Office: OGC or ORC contact attorney to be determined on a case-by-case basis, depending on the subject matter of the MOU.

9. **Does the MOU set forth in a clear and concise manner the actions each party intends to undertake pursuant to the MOU?**

An MOU should clearly and concisely state what each party is expected to do, individually or together, under the MOU. The specific level of detail in this regard should be determined on a case-by-case basis.

Contact Office: OGC or ORC contact attorney to be determined on a case-by-case basis, depending on the subject matter of the MOU.

10. **Does the MOU contain mandatory language or other provisions that create, or appear to create, binding legal obligations?**

Although some provisions of an MOU may be intended to establish a new, legally binding commitment, MOUs for EPA purposes are generally intended to be primarily aspirational in nature. **Therefore, it is important that the language used in an MOU be considered carefully so as to ensure that it reflects the parties' intent to be bound or not bound by a specific provision.** This is particularly important given that, in the MOU context and with respect to other analogous documents, courts have found words such as "shall," "must," and "will" to be indicative of a legally binding intent, depending on the particular circumstances involved. Other words that could potentially be construed as conveying binding intent are "require," "commit," as well as "should" when used in place of "shall." In some cases, the court has viewed the use of mandatory language in an MOU as evidence that an agency had entered into a binding contract.¹ Of particular concern to EPA, however, is the potential that a court would interpret the use of mandatory terminology in an MOU as rising to the level of one of the following: (1) a procedural rule (if the mandatory requirements impact only federal government

¹ See, e.g., *Total Medical Management v. U.S.*, 104 F.3d 1314 (Fed. Cir. 1997), in which the U.S. Court of Appeals for the Federal Circuit found the MOU at issue to have all of the basic elements of a contract, and therefore be indicative of an intent to be legally bound, notwithstanding the parties' intent (MOU between United States and private health care company could bind the U.S. in contract).

procedures); (2) a substantive rule² (if the mandatory requirements impose legal obligations or rights on non-federal parties); or (3) an interpretive rule (if found to provide the Agency's interpretation of a statute or regulation).³ Though the inclusion of text in an MOU stating that the instrument is not intended to be legally binding may strengthen EPA's position regarding its legal intent, a court will not necessarily accept boilerplate language as determinative of a party's intent and, therefore, including such language should not be assumed to be sufficient.

This does not mean that "mandatory" terminology may never be used in an MOU since there are, in fact, specific instances where such terminology may be warranted (e.g., where such language is being used to recite an existing legal duty or where a third party is agreeing to grant EPA a copyright license).⁴ Rather, this Checklist is intended only to highlight the potential legal risk associated with the use of "mandatory" terminology in those instances where the parties do not wish to be legally bound. In such instances, and to the extent practicable, "non-mandatory" terminology should be used in an MOU.

Suggested terms for an intention not to be bound include: intends, resolves, plans, and expects. The term "agrees" may also be used in a non-binding MOU provision; however, because this term may also be used to convey an intent to be legally bound, this term should be used sparingly and only as the specific circumstances warrant.

If a reviewer has any doubt or question about whether to include mandatory terminology in an MOU, that reviewer should err on the side of caution and contact CCILO.

OGC Contact Office: CCILO

² See, e.g., *West Virginia Mining and Reclamation Ass'n v. Snyder*, 1991 WL 331482 (ND W Va 1991), in which the District Court held that an MOU between the Department of Interior's Office of Surface Mining Reclamation and Enforcement and the West Virginia Division of Energy was a substantive rule because it was "designed to implement, interpret or prescribe law or policy." See also, Comptroller General letter to Senator Bingaman, Subject: Recognition of R.S. 2477 Rights-of-Way under the Department of Interior's FLPMA Disclaimer Rules and its Memorandum of Understanding with the State of Utah, 2004 WL 235329 at *3 (Comp. Gen. 2/6/04), in which the Comptroller General opines that the MOU with Utah was a substantive rule because it "both satisfies the APA's definition of 'rule' ...and meets the key test by which courts have defined substantive rules ... it has a binding effect on the agency and other parties and represents a change in law and policy."

³ See, e.g., *Bragg v. Roberston*, 72 F.Supp 2d 642, 654-55 (S.D. W.Va. 1999), in which the District Court held that an MOU entered into by EPA, OSM, ACOE and W. Va. DEP was an interpretive rule. Ultimately, the court rejected the MOU on the basis that it was inconsistent with, and an erroneous interpretation of, the CWA.

⁴ If mandatory terminology is used in an MOU to refer to an existing legal duty, then the applicable law (e.g., statute, regulation, or U.S. treaty) should be cited.

11. Does the MOU contain the appropriate “no private right of action” language?

Each MOU should contain a statement that the MOU does not create a private right of action by a non-party. The following “no private right of action” language is suggested:

This MOU does not create any right or benefit, substantive or procedural, enforceable by law or equity, by persons who are not party to this agreement, against [name of other party] or EPA, their officers or employees, or any other person. This MOU does not direct or apply to any person outside of [name of other party] and EPA.

OGC Contact Office: General Law Office (GLO)

12. Does the MOU provide for its commencement, duration, modification, and termination?

Even though primarily or, in some cases, entirely aspirational in nature, all MOUs should provide for their commencement, duration, modification, and termination. See below for suggested text:

Commencement/ Duration/Modification/ Termination

This MOU is to take effect upon the signature of the parties and remain in effect for a period of [X] years. This MOU may be extended or modified, at any time per the mutual written consent of the parties. Additionally, a party may terminate its participation in this MOU at any time by providing written notice to the other party[ies], at least [X] days in advance of the desired termination date.

OGC Contact Office: CCILO

There may be provisions in an MOU that the parties agree should continue after the agreement terminates, such as licenses of intellectual property and treatment of confidential information. In that case, the reviewer should consider inserting a survival clause into the MOU. Below is an example of a survival clause:

The obligations the parties agree to in paragraph [X, Y, & Z] will continue after other provisions of this MOU have been terminated.

Financial Provisions

- 13. Does the MOU purport or appear to obligate funds? Does the MOU provide for compliance with appropriations law and Agency policies relating to competition for grants and contracts?**

Agency officials signing MOUs must ensure that the document they are signing does not obligate appropriated funds or otherwise make a legally binding commitment to expend EPA resources in order to comply with the Antideficiency Act, 31 U.S.C. 1341 and 1342, the Recording Statute, 31 U.S.C. 1501, and Subpart 1.6 of the Federal Acquisition Regulation governing unauthorized commitments of funds. Below is model language that clearly states the Agency's intention not to make such commitments. There are other acceptable ways of expressing such limitations and so alternate language may be used so long as the 'statement of no financial commitment' is clear and unambiguous.

MOU/MOAs With Non Federal Parties

As required by the Antideficiency Act, 31 U.S.C. 1341 and 1342, all commitments made by EPA in this MOU are subject to the availability of appropriated funds. Nothing in this MOU, in and of itself, obligates EPA to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations that would be inconsistent with Agency budget priorities. [Name of party] agrees not to submit a claim for compensation for services rendered to EPA in connection with any activities it carries out in furtherance of this MOU. This MOU does not exempt [name of party] from EPA policies governing competition for assistance agreements. Any transaction involving reimbursement or contribution of funds between the parties to this MOU will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.

MOUs with Federal parties

As required by the Antideficiency Act, 31 U.S.C. 1341 and 1342, all commitments made by EPA and [Name of Agency] in this MOU are subject to the availability of appropriated funds and budget priorities. Nothing in this MOU, in and of itself, obligates EPA to expend appropriations or to enter into any contract, assistance agreement, interagency agreement, or incur other financial obligations. Any transaction involving transfers of funds

between the parties to this MOU will be handled in accordance with applicable laws, regulations, and procedures under separate written agreements.

OGC Contact Office: CRFLO

14. Does the MOU create the appearance that federal agencies are jointly financing a commission, board, or similar organization to carry out governmental responsibilities?

Interagency financing of commissions, boards, or similar organizations that perform governmental functions, is prohibited by 31 U.S.C. 1346(a)(as consistently stated in an annual provision in the Treasury Appropriations Act, which has government-wide effect). This is commonly referred to as the so called “pass the hat” prohibition. Note that this prohibition does not extend to single agency financing of activities of common interest to more than one agency. It also does not prohibit cooperation among agencies on environmental projects.

The “pass the hat” prohibition is complicated and if a reviewer believes there is an issue in this area, the reviewer should contact CRFLO’s Claims, Property, and Appropriations Law Practice Group leader.

OGC Contact Office: CRFLO

15. Does the MOU include an indemnification provision?

An indemnification provision is a provision by which a party agrees to satisfy monetary claims against another party. An indemnification agreement may also be characterized as a “hold harmless” provision in which one party agrees to insure another against claims or losses. EPA cannot enter into indemnification or hold harmless agreements because these provisions potentially expose the Agency to unlimited liabilities in advance of, or in excess of, available appropriations in violation of the Antideficiency Act, 31 U.S.C. 1341.

When faced with an indemnification or hold harmless provision, the reviewer should first advise the program office(s) to simply delete the provision from the MOU. If a program indicates that a party wants some type of coverage on liability, the reviewer should contact CRFLO’s Claims, Property, and Appropriations Law Practice Group leader for advice regarding how to craft language for the MOU that will explain the provisions of the Federal Tort Claims Act. Below is model FTCA language.

Each party agrees that should a third party claim arise under the terms and conditions of the Federal Tort Claims Act (FTCA), Title 28, U.S.C., 1346 and 2671 et seq., or of the laws of the state of [X] based on negligence or a wrongful act or omission, the party whose employee(s)' conduct gave rise to the claim shall be responsible for the investigation and disposition of said claim. For claims involving conduct of employees of more than one party arising out of a joint activity conducted pursuant to this MOU, the parties agree to work cooperatively to determine which entity will be primarily responsible for the investigation and disposition of the claim.

OGC Contact Office: CRFLO

Intellectual Property/Trademark Issues

16. Is it possible that the activities described in the MOU may create intellectual property?

Intellectual property issues may also arise in MOUs, especially those involving collaborative research and development, the presentation of trainings or seminars, or the creation of informational materials, including software or models. MOUs that involve the use or creation of intellectual property can range from the creation of a copyrightable journal article, to the creation of a named (trademarked) initiative, to the development of a patented process. If intellectual property may be created as a result of this MOU, the reviewer should consult OGC's Intellectual Property Law Practice Group (IPLPG) to make sure the proper legally binding provisions are included in the MOU. Discussion between IPLPG and the program office is necessary when considering the terms a program office would prefer regarding the disposition of intellectual property. An MOU should not include language indicating that the parties will negotiate terms in the future if intellectual property is created. Instead, the MOU should specify how later-created intellectual property will be negotiated.

Great care should be taken when considering the terms a program office would prefer regarding the disposition of intellectual property, as it is much easier to include provisions in the original agreement than to try to negotiate such language later. For example, the program office may want a copyright license to articles or software created jointly, or may want materials created by parties to the MOU to be placed in the public domain and be free of charge to anyone. Below is some sample language regarding activities that may create intellectual property. Note, however, that the language should be customized for the particular situation.

The parties agree that any copyrightable subject matter, including but not limited to journal articles, training, educational or informational material or software, created jointly by the parties from the activities conducted under the MOU may be copyrighted by [name of other party]. [Name of other party] hereby grants to the government a royalty-free, nonexclusive, irrevocable right to reproduce, distribute, make derivative works, and publish or perform the work(s) publicly, or to authorize others to do the same on its behalf.

The parties agree that any patented invention created by [name of other party] pursuant to the terms of this MOU will be jointly owned by the parties regardless of inventorship, unless an alternative agreement indicates otherwise.

OGC Contact Office: GLO/IPLPG

17. Does the MOU authorize, or imply, that a party may use the EPA seal or identifier (logo)?

The Agency's official seal and identifier may only be used for official purposes. They may not be used to promote commercial products or services. EPA Order 1015.2A (December 27, 1978). Use of the seal or identifier on the MOU document or in EPA's own written material/web content ("products") relating to the activities carried out under the MOU would meet the official purpose test. Additionally, a party to the MOU may be allowed to display the Agency seal on brochures and other materials relating to joint activities. However, any product, including those products of the other parties to the MOU, that use the Agency seal or identifier must first be reviewed and approved by EPA's product review process in the Office of Public Affairs before it can be released.

OGC Contact Office: GLO/IPLPG

18. Does the MOU authorize a party to use a program name or logo used by the Agency?

The reviewer of an MOU needs to carefully examine the MOU for any possible use of an Agency program name or logo, or the creation of a new named program initiative. This is most likely to occur when the MOU involves an Agency voluntary partnership program. Any agreement involving a voluntary partnership program, or any agreement proposing the use of a name or logo whether owned or created by the Agency or another party, should be reviewed by GLO/IPLPG.

OGC Contact Office: GLO/IPLPG

Confidential Business Information

- 19. Will the MOU involve sharing information that a non-federal party may consider to be proprietary?**

Below is model text for use when an MOU may involve the sharing of proprietary information.

To carry out the joint activities described in the MOU, [name of other party] may need to disclose proprietary information to EPA. Proprietary information is defined as information that an affected business claims to be confidential and is not otherwise available to the public. (Name of other party) agrees to clearly identify confidential business information disclosed to EPA in writing; and to clearly memorialize in writing, within a reasonable time, any confidential information initially disclosed orally. EPA agrees not to disclose, copy, reproduce or otherwise make available in any form whatsoever to any other person, firm, corporation, partnership, association or other entity information designated as proprietary or confidential information without consent of [name of other party] except as such information may be subject to disclosure under the Freedom of Information Act (5 U.S.C. 552), and EPA's regulations at 40 C.F.R. Part 2, or as otherwise authorized by law.

OGC Contact Office: GLO

Outside Organizations

- 20. Does the MOU indicate that EPA is establishing, or actively participating in establishing, a corporation?**

Under 31 U.S.C. 9102, no federal agency may establish or acquire a corporation that acts as a federal agency unless the agency has statutory authority to do so. EPA does not have the requisite authority; therefore, an MOU must not establish, or appear to establish, a corporation.

OGC Contact Office: CRFLO

21. Does the MOU create the appearance that EPA is establishing or participating in a *de facto* organization?

Some MOUs establish organizations that, while not officially incorporated, function or appear to function as independent legal entities. These organizations are often characterized as “associations” or “partnerships.” EPA participation in such efforts must be carefully structured to ensure that the Agency does not expose itself to monetary claims that may arise from a third party such as a professional services vendor or meeting facility that seeks to hold the members of the association or partnership joint and severally liable for actions taken by other members. Such measures are necessary to comply with the Antideficiency Act, 31 U.S.C. 1341 and 1342, the Recording Statute, 31 U.S.C. 1501, and Subpart 1.6 of the Federal Acquisition Regulation governing unauthorized commitments of funds.

Note that although it is permissible for EPA to cooperate with public and private organizations on matters of mutual interest to encourage and coordinate efforts to protect human health and the environment, the Agency participates in these efforts in its capacity as a federal agency and not as a “partner” in the legal sense of sharing assets and liabilities with other signatories to the MOU. Consequently, OGC strongly discourages programs from entering into MOUs that contemplate EPA participation on Boards of Directors, Governing Councils, Steering Committees, or similar bodies. If the program office insists on entering into an MOU that includes these features, or similar ones, the reviewer should advise the program of the risks and ensure that the MOU contains caveats clearly stating that the organization is not a legal entity with powers to enter into contracts, incur liabilities, own or create intellectual property, or otherwise make legally binding commitments of the funds or other assets of the Agency.

OGC Contact Office: CRFLO

22. Does the MOU contemplate that an EPA official will serve on the Board of Directors or a similar body that governs a non-federal organization?

Ethics Advisory 97-12 generally prohibits EPA employees from serving in their official capacities on Boards of Directors or similar governing bodies of non-federal organizations. Agency employees may serve as liaisons to Boards in a non-voting capacity. To the extent permitted by EPA policies governing grants and contracts, EPA employees also may serve as members of informal advisory committees and similar bodies that do not have fiduciary responsibilities for governing the non-federal organization. In addition, employees may serve as a member of the board of a private voluntary standards organization in limited circumstances. See OLC opinion “Application of 18 U.S.C. 208 to Service by Executive Branch Employees on Boards of Standard-Setting Organizations, 8/24/1998.

OGC Contact Office: Ethics Office

Endorsements

23. **Does the MOU imply that EPA endorses the purchase or sale of commercial services or products?**

Under the Ethics Regulations at 5 CFR § 2653.702(c), EPA cannot enter into MOUs that endorse, or may be used to imply that EPA endorses, the purchase or sale of commercial services or products. Such an action would violate the impartiality standard of 5 CFR § 2635.702. Below is suggested language to help address this issue.

Under Federal ethics rules, EPA may not endorse products or services provided by private entities. Nothing in this MOU constitutes an endorsement by either party of the products, services, and/or fundraising activities of the other. [insert name] agrees not to make statements to the public at workshops and meetings, promotional literature, on its web site or through any other media that imply that EPA endorses [name of party] or any service or product offered by [insert name]. In addition, [name of party] agrees not to make statements that imply that EPA supports [name of party]'s efforts to raise public or private funds. Any statements or promotional materials prepared by [insert name] that describe this MOU must be approved in advance by EPA.

OGC Contact Office: Ethics Office

Civil Rights Issues

24. **Does the MOU contemplate activities that are intended to benefit certain individuals because of their race or certain entities because of the race of their stakeholders (e.g., students, constituents, members)?**

A government's use of race as a basis for decision-making would be subject to strict judicial scrutiny if challenged, even if race is one of several bases for a decision. A federal, state, or local agency would have to demonstrate by particularized evidence that its use of race is narrowly tailored to achieve a compelling governmental interest. *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Passing strict scrutiny would be a significant undertaking. OGC generally advises programs to avoid engaging in activities that would subject EPA to strict scrutiny. EPA's proposed activities, including collaboration with Historically Black Colleges and Universities or Minority-Serving

Institutions, would not trigger strict scrutiny when race is only incidental to the Agency's reason for collaborating. Similarly, other typical EPA activities would not trigger strict scrutiny if, rather than race, health disparities, severe exposure to environmental harms, or other race-neutral criteria are the reasons EPA decided to focus on the minority entity or community. Strict scrutiny does not apply to programs for Federally recognized American Indian tribes or their members. These tribes are quasi-sovereign entities, and the affiliation with them is political.

OGC Contact Office: CRFLO/Civil Rights Practice Group

Other Potential Legal Issues

25. Does the description of activities in the MOU raise issues under the Federal Advisory Committee Act?

If the MOU includes provisions for the formation of a group that includes one or more individuals who are not full-time or permanent part-time federal employees, the Federal Advisory Committee Act (FACA) may apply to the group. With a few exceptions, FACA applies to groups established or managed and controlled by a federal agency if the group includes individuals who are not federal employees and the agency obtains collective advice from the group. The CCILO FACA attorney should be contacted if a reviewer has questions regarding the applicability of FACA.

OGC Contact Office: CCILO

26. Does the Paperwork Reduction Act apply to activities under the MOU?

The Paperwork Reduction Act (PRA) generally requires that a federal agency obtain Office of Management and Budget (OMB) approval before conducting or sponsoring a collection of information by means of identical questions to ten or more persons, even if the requested responses are voluntary. Note that a federal agency may be responsible when information is collected by a third party under the sponsorship of the Agency.

OGC Contact Office: CCILO

Conclusion

As previously indicated, this Checklist is intended to serve as guidance regarding the review of MOUs and other similar, generally aspirational, cooperative agreements (e.g., Memoranda of Agreement, Joint Statements of Cooperation, Statements of Intent, Letters

of Intent). This Checklist is not intended, however, to be all inclusive; rather, it is intended to provide general guidance on those issues most frequently raised in the MOU context. Additionally, this Checklist provides the relevant OGC office and attorney contact information.

APPENDIX

OGC ATTORNEY CONTACT INFORMATION

Contact for Questions 10, 12, and Other General MOU Issues

- *Jocelyn Adkins, OGC/CCILO:* 202/564-5424; adkins.jocelyn@epa.gov

Contact for Questions 3, 12-15, 20-21, and Other Finance Law Issues

- *Lucille Liem, OGC/CRFLO:* 202/564-5699; liem.lucille@epa.gov

Contact for Questions 12, 22-23, and Other Ethics Issues

- *Peggy Love, OGC/Ethics:* 202-564-1784; love.peggy@epa.gov

Contact for Question 24 and Other Civil Rights Issues

- *Tanya Lawrence, OGC/CRFLO/CRPG:* 202-564-2916; lawrence.tanya@epa.gov

Contacts for Questions 11-12, 16-18, and Other Intellectual Property Issues

- *Geoffrey Cooper, OGC/GLO/IPLPG:* 202/564-5451; cooper.geoffrey@epa.gov
- *Kathleen Coleman, OGC/GLO/IPLPG:* 202/564-5449; coleman.kathleen@epa.gov

Contact for Question 4 and Other Issues involving Indian tribes

- *Tim McLaughlin, OGC/CCILO/C&EPG:* 202/564-5557; mclaughlin.tim@epa.gov

Contact for Question 5 and Other International Issues

- *Jocelyn Adkins, OGC/CCILO/IELPG:* 202-564-5424; adkins.jocelyn@epa.gov

Contact for Question 19 and Other Information Issues

- *Geoffrey Cooper, OGC/GLO:* 202-564-5451; cooper.geoffrey@epa.gov
- *Kathleen Coleman, OGC/GLO:* 202-564-5449; coleman.kathleen@epa.gov

Contact for Question 25 – Issues involving the Federal Advisory Committee Act

- *Marilyn Kuray, OGC/CCILO:* 202/564-3449; kuray.marilyn@epa.gov

Contact for Question 26 – Issues involving the Paperwork Reduction Act

- *David Coursen, OGC/CCILO:* 202/564-0781; coursen.david@epa.gov